Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

GREGORY C. KRUG,

*Petitioner,*

*vs.*

AMBROSE, WILSON, GRIMM & DURAND, WILLIAM C. WILSON, PAUL T. COLEMAN, and VALLEY FIDELITY BANK AND TRUST COMPANY,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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53 pp

## QUESTION PRESENTED

Is the Sixth Circuit of the United States Court of Appeals required to follow the law established by the United States Supreme Court in *Celotex v. Catrett* (1986) 477 U.S. 317?

## PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, First Tennessee Bank National Association, into which Valley Fidelity Bank and Trust Company was merged after the commencement of this litigation, is also a real party in interest.

## RULE 29.1 STATEMENT

First Tennessee Bank National Association is a wholly-owned subsidiary of First Tennessee National Corporation.

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**In The**
**SUPREME COURT OF THE UNITED STATES**
**October Term, 1993**

GREGORY C. KRUG,[1]
*Petitioner,*
*vs.*
AMBROSE, WILSON, GRIMM & DURAND, WILLIAM C. WILSON, PAUL T. COLEMAN, and, VALLEY FIDELITY BANK AND TRUST COMPANY,
*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI

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Petitioner respectfully prays that a Writ of Certiorari issue to review a judgment and order of the United States Court of Appeals for the Sixth Circuit.

## OPINIONS BELOW

The Sixth Circuit issued its unpublished opinion on January 3, 1994. (Appendix A) The District Court's orders and opinions of May 5, 1992 and January 19, 1993, reviewed on appeal, are unpublished, but appear herein as Appendix B and Appendix C. Both courts' orders and opinions are available for all to see in LEXIS (1994 U.S. App. LEXIS 127; 1992 U.S. Dist. LEXIS 22052 and 1993 U.S. Dist. LEXIS 19506).

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[1] Frederick H. Kranz, of Graham & James, has agreed to represent Petitioner in this matter if certiorari is granted.

## JURISDICTION

The Federal Courts have jurisdiction because: (1) the amount in controversy exceeds $50,000; (2) the Petitioner is a citizen and a resident of California, and all the Respondents are citizens and residents of Tennessee. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) to review the final decision of the Sixth Circuit of the United States Court of Appeals.

## STATEMENT OF THE CASE

In the mid-1950's, Petitioner Gregory C. Krug's ("Krug") father, George, and George's brother, Julius, formed a 50/50 partnership known as Tennessee Associates. Tennessee Associates owned 100% of the stock of Volunteer Asphalt Company ("Volunteer") and Volasco Products Company ("Volasco"). Volunteer acquired the exclusive right to process asphalt in East Tennessee for Shell Oil Company. Some of the asphalt was sold to road contractors and the rest was sold to Volasco.

Volasco used Volunteer's asphalt to manufacture roofing products and it immediately became very successful. Shortly thereafter, the largest U.S. manufacturer of roofing products, Lloyd H. Frye Roofing ("Frye"), commenced a plan of predatory (below cost) pricing designed to destroy Volasco. Volasco brought suit against Frye under the Sherman and Clayton Acts. Volasco's lawyer was William C. Wilson ("Wilson"), a partner in Ambrose & Wilson, the predecessor of defendant Ambrose, Wilson, Grimm & Durand ("Ambrose-Wilson"). After eight years of litigation, Volasco obtained a judgment against Frye which was about equal to its legal fees. (346 F.2d 661) The litigation was

extremely destructive to the Krug family, but this was only the beginning of its litigation nightmare.

In the early 1960's, one of George's former employers, Thomas Epstein, filed suit against George and Julius, alleging that the asphalt business had been formed while they were officers of his corporation and hence he was the equitable owner of the corporations which George and Julius founded. Since the corporations were George's only source of income, had Epstein succeeded, George would have been financially ruined. Epstein did not prevail (for George and Julius had kept Epstein fully informed as to their formation of the asphalt business and Epstein had declined to participate) but the Krug family's litigation nightmare was still not over.

Sometime later, Julius became jealous of George's financial success and filed suit against George to force a dissolution of Tennessee Associates.[2] After a three-year receivership, the Knox County Chancery Court ruled that, by virtue of Volunteer's execution of a twenty-year contract with Shell Oil, Tennessee Associates was a partnership for a definite term, which could only be dissolved at great cost to the moving partner. The suit was eventually resolved when Julius purchased George's half-interest in Tennessee Associates.

After more than ten years of litigation, the Krug family had acquired a hatred of litigation which cannot be discussed in mixed company. Krug was actively employed in the asphalt business and he was very familiar with the Family's litigation nightmare. Wilson, as both

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[2] **Wilson did not represent George in this matter, because Wilson told George that such representation would be an unethical conflict of interest.**

the Family's lawyer and its purported friend, was equally aware of the Family's hatred of litigation.

Ambrose-Wilson and Wilson knew that the protracted and expensive litigation the Family had endured regarding Tennessee Associates was attributable to the fact that there was no arbitration clause in the Tennessee Associates partnership agreement.

On August 8, 1984, Krug and George formed a partnership known as Krug Investments (the "Partnership"). On May 4, 1987, George established the George Charles Krug Trust (the "Trust"), an inter vivos, revocable trust. George transferred substantially all of his property to the Trust, and appointed himself and Eleanor as its co-trustees. The Trust instrument provided that, upon George's death: (1) the Trust would become irrevocable; (2) Krug would become a successor co-trustee along with Eleanor, and (3) the Trust would be trifurcated into three separate trusts.

On July 7, 1988, George died and hence Krug became a successor Co-trustee of the Trust, along with Eleanor. Krug was then confronted with the decision as to how he could manage the three Trusts' funds with maximum efficiency. Rather than manage each Trust's funds separately, he decided to co-mingle all of the Trusts' funds in a partnership,[3] as authorized by Article IV (A)(12) of the Trust Agreement. Rather than form a new partnership, Krug decided to utilize the Partnership, which had been inactive since 1987. Krug therefore personally prepared an amended and restated Partnership Agreement for the Partnership.[4]

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[3] Virtually all Trust departments employ a similar program, known as "common trust funds."

[4] While Krug is not a lawyer, he is familiar with California partnership agreements as a result of his CPA practice.

On July 19, 1988, Krug, as the co-managing partner of the Partnership, retained Ambrose-Wilson, specifically Wilson, to provide legal advice concerning the amended and restated Partnership agreement, prior to transferring the Trusts' assets thereto. Wilson and Ambrose-Wilson represented the Partnership and therefore represented all of its partners.

On that day, Krug sent a draft of the amended and restated Partnership Agreement to Wilson. Krug took this action because, as a California resident, both he and his California lawyers were totally ignorant as to Tennessee law. The Partnership Agreement contained a clause mandating arbitration of any dispute between the partners. In the letter, Krug asked Wilson to review the Partnership Agreement "as to compliance with local law."

During one of several telephone conversations in July 1988, Krug told Wilson to make sure that the Partnership Agreement was "bullet proof," and reminded Wilson of the three-year Tennessee Associates litigation the Family had previously endured.

On July 22, 1988, Wilson opined that: "We have reviewed the Partnership Agreement and find it to be very complete and *in compliance with Tennessee law.*" (Emphasis added.)

Ambrose-Wilson's statement of August 25, 1988 reflects Wilson's charges for his review of the Partnership Agreement. On October 3, 1988, Krug sent Ambrose-Wilson the Partnership's check in full payment of the charges set forth on its August 25, 1988 statement.

From July 1988 through December 1989, both the Trust and the Partnership operated very efficiently. In January 1990, Eleanor expressed to Krug her desire to move from the Family home in Louisville (an asset of

the Trust) to a condominium in West Knoxville. Krug, acting in his capacity as a co-trustee of the Trust, determined that the condominium which Eleanor had selected was excessively large and somewhat overpriced. As a result of this dispute, on May 18, 1990 Eleanor removed Krug as a co-trustee of the Trust and appointed Valley Fidelity Bank & Trust ("Valley") in his stead.

On June 1, 1990, Ambrose-Wilson, representing Eleanor and Valley, filed suit in the Knox County Chancery Court[5] against its clients, Krug and the Partnership, without obtaining either client's consent, in direct violation of the Tennessee Code of Professional Responsibility (EC 517; DR 5-105).[6] They sought, among other things, a dissolution of the Partnership without regard to the arbitration clause.

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[5] Eleanor B. Krug, Individually and as Trustee of the Eleanor Barron Krug Revocable Trust and Eleanor B. Krug and Valley Fidelity Bank and Trust Company, Co-Trustees of the George Krug Trust v. Gregory C. Krug, a Resident of California, Krug Investments, a Tennessee General Partnership, and Morgan, Keegan & Co., Inc., a Tennessee Corporation, Chancery Court for Knox County, Tennessee, Docket No. 105013-2 (the "Chancery Litigation").

[6] DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests . . . (Footnotes omitted.)

On July 24, 1990, Krug filed a Motion to dismiss the Partnership from the Chancery Litigation due to the presence of the arbitration clause. At a hearing on December 19, 1990, Ambrose-Wilson convinced the Chancery Court that the arbitration clause (which Ambrose-Wilson had previously opined "complied with Tennessee law") was unenforceable under Tennessee law.

During the trial, Krug again demanded that the Partnership issues should go to arbitration. Ambrose-Wilson successfully argued that, under Tennessee law, the issue as to the dissolution of the Partnership could not go to arbitration under the authority of a reported Tennessee case, *Young v. Cooper* (1947) 203 S.W.2d 376, which was decided 41 years before Wilson told Krug that the Partnership Agreement was ". . . very complete and in compliance with Tennessee law."

The Tennessee Court of Appeals declined to review the Chancery Court's refusal to enforce the Partnership's arbitration clause on the grounds that, once the Chancery Court ordered that the Partnership be dissolved, the issue as to whether the arbitration clause was valid was "moot" — despite the fact that, to this day, the Partnership continues to exist, albeit in a receivership — just as was the case with Tennessee Associates.

Krug brought this action on June 10, 1991. On December 11, 1992, Ambrose-Wilson moved for summary judgment. Krug filed his opposition thereto on December 28, 1992. Krug believed that, while not mandatory, the deposition of the presiding Chancellor in the Chancery Litigation would be helpful, so he caused a subpoena to be issued on January 6, 1993, demanding that the Chancellor make himself available to give a deposition on January 25, 1993. On January 19, 1993, the District Court granted Ambrose-Wilson's summary

judgment motion, quashed the subpoena Krug had issued to the Chancellor, and ruled that there be no further discovery. The Sixth Circuit affirmed the District Court's decision on January 3, 1994.

## REASONS FOR GRANTING THE WRIT

A Writ to the Sixth Circuit should issue because its decision is directly contrary to the principles established in *Celotex v. Catrett* (1986) 477 U.S. 317.

### The Sixth Circuit Refused To Follow The *Celotex* Doctrine

On page 4 of the District Court's Memorandum Opinion [Appendix C], which was adopted verbatim by the Sixth Circuit [Appendix A], it stated that:

> [T]here is *nothing* here (in the Record) to establish that an issue exists concerning whether the defendants' failure, if any, to predict or to guard against the Chancery Court's ultimate ruling that a suit to dissolve the partnership was within its jurisdiction, and not subject to arbitration, was a breach of the applicable standard of professional care. Such a showing is essential to plaintiff's case here and *must be made with competent expert testimony. Cleckner v. Dale* (1986) 719 S.W.2d 535 . . . The burden of a plaintiff who opposes a motion for summary judgement in a case in which *expert testimony* is

> essential to come forward with such *testimony* at the summary adjudication stage of the litigation, or suffer dismissal for his failure to carry this burden, is now well established. *Celotex Corporation v. Catrett* (1986) 477 U.S. 317 . . . The plaintiff had the duty to come forward with *opposing expert testimony*, to show the existence of a genuine issue of material fact. The plaintiff has not carried this burden, after a full opportunity to do so. The result is that the Court must grant the moving defendants' motion for summary judgment. It is unnecessary to address the other issues raised by this motion. (Emphasis added.)

The Sixth Circuit's opinion is in direct conflict with two principles established by the *Celotex* court and it must therefore be reversed.

**1. The Sixth Circuit erred when it ruled that the nonmoving Party is required to submit an expert's affidavit with his opposition to a summary judgment motion.**

The District Court granted, and the Sixth Circuit affirmed, Ambrose-Wilson's summary judgment motion solely because Krug did not attach an expert's affidavit to his opposition to Ambrose-Wilson's summary judgment motion. This decision is absolutely amazing in that the *Celotex* Court unequivocally determined that, under Fed. R. Civ. P. 56, neither the moving nor the

nonmoving party is required to provide any affidavits in connection with a summary judgment motion:[7]

> We do not mean that the non-moving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. (at 324) . . . A plaintiff need not initiate any discovery or reveal his witnesses or evidence unless required to do so under the Discovery Rules or by Court order. Of course, he must respond if required to do so; but *he need not* also depose his witnesses or *obtain their affidavits* to defeat a summary judgment asserting only that he has failed to produce any support for his case. (at 328) (Emphasis added.)

The Sixth Circuit openly defied the United States Supreme Court's interpretation of Fed. R. Civ. P. 56 when it affirmed the District Court's ruling that Krug's failure to submit an expert's affidavit with his opposition to Ambrose-Wilson's summary judgment motion was, standing alone, sufficient grounds on which to grant Ambrose-Wilson's Summary Judgment Motion.

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[7] Contrary to the District Court's opinion, the *Celotex* decision did not involve any expert testimony.

**2. The Sixth Circuit erred when it refused to resolve all reasonable doubt against Ambrose-Wilson.**

According to the *Celotex* Court:

> Summary judgment should not be granted unless it is clear that a trial is unnecessary, *Anderson v. Liberty Lobby, Inc.*, Ante at 255, and *any* doubt as to the existence of a genuine issue for trial should be resolved against the moving party, *Adickes v. S.H. Kress & Co.* (1970) 398 U.S. 144, 158-159. In determining whether a moving party has met its burden of persuasion, the Court is obligated to take account of the entire setting of the case and must consider *all papers of record as well as any material prepared for the motion* . . . As explained by the Court of Appeals for the Third Circuit *In re Japanese Electronic Products Anti-trust Litigation* (1983) 723 F.2d 238, Rev-d on other grounds, sub nom.; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* (1986) 475 U.S. 574, "[If] . . . there is any evidence in the record from any source from which a reasonable inference in the (non-moving party's) favor may be drawn, the moving party simply cannot obtain a summary judgment . . ." (Emphasis added.) Footnote 2 at 330.

Let us examine the evidentiary material which Krug presented to the District Court to see if: ". . . there is any evidence . . . from which a reasonable inference in [Krug's] favor can be drawn . . .", for if there was, then the Sixth Circuit should have followed *Celotex* and reversed the District Court: (a) Exhibit 1 to Krug's Opposition to Ambrose-Wilson's Summary Judgment Motion is a letter from Wilson, in which he states that: "As you may know, the Krug Family, including Eleanor, has been involved in two bitter lawsuits . . . She may not be able to survive another"; (b) Exhibit 2 was Krug's letter of July 19, 1988, which accompanied a draft of the Partnership Agreement. In that letter, Krug asked Wilson to determine whether the Partnership Agreement complied with Tennessee law; (c) Exhibit 3 is Wilson's letter to Krug in which Wilson states that: "We have reviewed the partnership agreement and find it to be very complete and in compliance with Tennessee law"; (d) Exhibit 26 is an excerpt from a transcript of a hearing which was held on December 19, 1990 in which the Chancery Court made the following statements:

> THE COURT: As a preliminary matter, I would like to have you gentlemen address the issue of arbitration . . . I notice that the contract provides for that. I also notice that that clause is *pretty inartfully drawn.* I notice it must have been *drawn by a layman somewhere else* . . . we don't have a Superior Court System in this state . . . *It's pretty vague.* It just says, "shall go to arbitration in Blount County, Tennessee" . . . *I don't know what that means.* Then it says that "it shall be enforced in the Superior

> Court." And *I don't know what that means* either . . . *How are you going to enforce an arbitration clause that calls for enforcement in the Superior Court which does not exist? How are you going to do that?*[8] (Emphasis added.)

When the Chancery Court stated that the arbitration clause was prepared by a "layman somewhere else," it obviously believed that the arbitration clause was prepared by someone who did not possess the skills of a Tennessee lawyer.[9] While the Chancery Court did not say that Wilson violated the "local standard of care," there is no other reasonable interpretation of the Chancery Court's use of the word "layman," and according to the *Celotex* Court, "any doubt as to the existence of a genuine issue for trial should be resolved against the moving party . . ." (p. 330, Footnote 2); (e) Exhibit 31A is an excerpt from a Post-trial Brief which was filed in the Chancery Litigation in which Wilson argued that the arbitration clause (which he previously opined complied with Tennessee law) does not apply to any controversy pertaining to the dissolution of the Partnership, relying

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[8] Despite this ringing condemnation of the arbitration clause Wilson approved, the District Court stated that: "[T]here is nothing here (in the record) to establish that an issue exists concerning whether the defendants' failure, if any, to predict or to guard against the Chancery Court's ultimate ruling that a suit to dissolve the partnership was within its jurisdiction, and not subject to arbitration, was a breach of the applicable standard of professional care."

[9] If the District Court had any doubt as to what the Chancellor meant by these words, then it should have permitted his deposition to proceed, rather than quashing Krug's subpoena of the Chancellor.

upon a reported Tennessee case, *Young v. Cooper*.[10] This case was decided forty-one years before Wilson opined that the Partnership Agreement complied with Tennessee law, and hence Ambrose-Wilson either knew, or should have known, that the Partnership's arbitration clause did not comply with Tennessee law. Furthermore, Ambrose-Wilson and Wilson were clearly negligent in that they should have recognized that since there is no "Superior Court" in Tennessee, the Partnership's arbitration clause would not be enforceable and they should have so advised Krug in 1988. Instead, they waited for almost three years, when they represented an adverse interest, to inform Krug that the arbitration clause did not comply with Tennessee law!

It is clear that the cumulative effect of these "papers of record" is that: (1) Krug inserted the arbitration provision into the Partnership Agreement to avoid *all* litigation; (2) Wilson told Krug that, under Tennessee law, the arbitration clause would serve its intended purpose; (3) the Chancery Court determined that the arbitration clause was unenforceable because it referred to a court which does not exist in Tennessee, and (4) these facts clearly constitute an adequate showing of "papers of record," which is all that the *Celotex* Court requires to defeat a summary judgment motion.

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[10] If an arbitration clause does not apply to a controversy regarding the dissolution of a partnership, then, as a practical matter, it does not apply to any controversy, because any partner can avoid the arbitration of any controversy merely by seeking the dissolution of the partnership.

**3. The Sixth Circuit erred when it ruled that, in legal malpractice cases, the Plaintiff cannot, under any circumstances, carry his burden of proof without the testimony of an expert witness.**

The District Court stated that: "competent expert testimony" is "essential to Plaintiff's case," citing *Cleckner v. Dale* (1986) 719 S.W.2d 535. But *Cleckner* does not say that; it holds that expert testimony is normally mandatory.

> Whether a lawyer's conduct meets the applicable professional standards is generally believed to be beyond the common knowledge of laypersons. Thus, *except in cases involving clear and palpable negligence*, most courts considering the issue have held that cases of legal malpractice cannot be decided without expert proof regarding the applicable standard of care and whether the lawyer's conduct complies with this standard. (at 540)

The *Cleckner* Court clearly understood that, in some cases, expert witness testimony is not needed, at least in Tennessee. For example, expert testimony was held unnecessary in a recent Georgia case, *Killingsworth v. Poon* (1983) 307 S.E.2d 123 at 124, in which a surgeon drove a syringe through a patient's shoulder and collapsed one of her lungs. In that case, the nonmoving party's affidavit did not declare that the defendant had violated the applicable standard of care. The Georgia Court of Appeals decided that the nonmoving party was not required to make this showing where the malpractice

is blatant. Furthermore, in *Suritz v. Kelner* (1963, Fla. App.) 155 So.2d 831, the Court held that if the jury were to find that the facts were as presented by plaintiff, the negligence of the attorney might appear from such facts, thus making the presentation of expert testimony unnecessary.[11]

Krug could prevail at trial without the testimony of an expert witness, because Wilson's malpractice is clearly proven by: (1) the Chancery Court's explanation as to why it refused to honor the arbitration clause, and (2) the Post-Trial Brief in the Chancery Litigation in which Wilson successfully argued that the arbitration clause was not applicable to a controversy concerning dissolution.

Even a jury could understand that Ambrose-Wilson and Wilson violated the local standard of care when they opined, in 1988, that the Partnership Agreement was "very complete and in compliance with Tennessee law,"

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[11] *Also See, Evans v. Watrous* (1835, Ala.) 2 Port 205; *Kirsch v. Duryea* (1978) 21 Cal.3d 303; *Wright v. Williams* (1975, 2d Dist.) 47 Cal.App.3d 802; *Lipscomb v. Krause* (1978, 2d Dist.) 87 Cal.App.3d 970; *Wilkinson v. Rives* (1981, 2d Dist.) 116 Cal.App.3d 641; *Berman v. Rubin* (1976) 138 Ga.App. 849; *Hughes v. Malone* (1978) 146 Ga.App. 341; *Gibson v. Talley* (1980) 156 Ga.App. 593; *House v. Maddox* (1977) 46 Ill.App.3d 68; *Brainerd v. Kates* (1979) 68 Ill.App.3d 781; *Schmidt v. Hinshaw, Culbertson, Moelmann, Hoban & Fuller* (1979) 75 Ill.App.3d 516; *Practical Offset, Inc. v. Davis* (1980) 83 Ill.App.3d 566; *Sorenson v. Fio Rito* (1980) 90 Ill.App.3d 368; *ABC Trans Nat. Transport, Inc. v. Aeronautics Forwarders, Inc.* (1980) 90 Ill.App.3d 817; *Bonhiver v. Rotenberg Schwartzman* (1972, CA7 Ill.) 461 F.2d 925; *Baker v. Beal* (1975, Iowa) 225 N.W.2d 106; *Hill v. Okay Constr. Co.* (1977) 252 N.W.2d 107; *Walters v. Hastings* (1972) 500 P.2d 186; *Lentino v. Fringe Employee Plans, Inc.* (1979, CA3 Pa.) 611 F.2d 474; *Lenius v. King* (1980, SD) 294 N.W.2d 912; *Hansen v. Wightman* (1975) 14 Wash.App. 78; *Olfe v. Gordon* (1980) 93 Wis.2d 173

when it was later determined, based upon Ambrose-Wilson's and Wilson's own argument, that the arbitration clause did not comply with Tennessee law. A jury of laymen could easily understand that if Ambrose-Wilson could find *Young v. Cooper* in 1991, they were negligent in not finding that case before they opined that the Partnership Agreement was "in compliance with Tennessee law."

Unless this Court finds that a plaintiff cannot carry his burden of proof in *any* legal malpractice case without the testimony of an expert witness, then it must find that the District Court erred when it ruled that: "such a showing . . . must be made with competent expert testimony." And if the Court finds that the District Court so erred, then it should also find that the Sixth Circuit also erred when it endorsed the District Court's ruling that: "the plaintiff had the duty (at the summary adjudication phase) to come forward with opposing *expert testimony*" for if *expert testimony* is not mandatory at a trial, it could not be mandatory at a summary judgment hearing!

## CONCLUSION

At page 5 of its Memorandum Opinion [Appendix C], the District Court stated that Krug: "has not carried this burden, after a very full opportunity to do so." According to Rule 10.1 of the Local Rules for the Eastern District of Tennessee, Krug had twenty days to respond to Ambrose-Wilson's summary judgment motion. During those twenty days, Krug learned, from reading the *Celotex* decision, that he was not required to attach an expert's affidavit to his opposition and therefore he did not do so. Now Krug has been denied his day in court, and Ambrose-Wilson has been absolved of any

culpability from the clearly erroneous advice it rendered to Krug and the Partnership in 1988, solely because Krug relied upon the *Celotex* decision.

Petitioner prays that certiorari be granted.

Dated: March 30, 1994.

Respectfully submitted,

GREGORY C. KRUG
*Pro se*

# APPENDIX A

**NOT RECOMMENDED FOR PUBLICATION**

No. 93-5252

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

**FILED**
JAN 3 1994
LEONARD GREEN, Clerk

GREGORY C. KRUG, Individually and as a Partner of Krug Investments; and as a Beneficiary of the Eleanor Barron [*sic*] Krug Q-Tip Trust, the Krug Family Trust, the Carol E. Krug 1988 Trust, and the Carol E. Krug 1974 Trust,
Plaintiff-Appellant,

v.

AMBROSE, WILSON, GRIMM & DURAND, a Tennessee Partnership; WILLIAM C. WILSON, Individually; PAUL T. COLEMAN, Individually; and VALLEY FIDELITY BANK & TRUST COMPANY,
Defendants-Appellees.

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
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**No. 93-5252**
***Krug v. Ambrose, Wilson, Grimm & Durand***

**ON APPEAL** FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

**BEFORE: BOGGS and NORRIS, Circuit Judges; CELEBREZZE, Senior Ciruit Judge.**

**PER CURIAM.** Plaintiff, Gregory C. Krug, appeals orders of the district court granting summary judgment to defendants in plaintiff's action arising out of a claim of malpractice.

Having carefully considered the record on appeal and the briefs of the parties, we are not persuaded that the district court erred in granting summary judgment to defendants.

As the reasons why judgments should be entered for defendants have been articulated by the district court, the issuance of a full written opinion by this court would be duplicative and serve no useful purpose. Accordingly, the judgments of the district court are **affirmed** upon the reasoning set out by that court in its Memorandum Opinions filed on May 5, 1992, and January 19, 1993.

# APPENDIX B

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF TENNESSEE**
**AT KNOXVILLE**

FILED
MAY 5 2:50 PM '92
U.S. DISTRICT COURT
EASTERN DIST. TENN.
By /s/ C. Sayles, Dep. Clerk

GREGORY C. KRUG, individually and as a partner of Krug Investments; and as a beneficiary of the Eleanor Baron Krug Q-Tip Trust, Krug Family Trust, Carol E. Krug 1988 Trust, and the Carol E. Krug 1974 Trust,

Plaintiff,

v.

AMBROSE, WILSON, GRIMM & DURAND, WILLIAM C. WILSON, PAUL T. COLEMAN, and VALLEY FIDELITY BANK & TRUST COMPANY,

Defendants.

No. CIV 3-91-0350

**ORDER**

For the reasons stated in the court's memorandum opinion filed simultaneously with this order, the court finds the defendant Paul T. Coleman's motion to dismiss, or, in the alternative, for summary judgment [doc. 23] well taken, and it is **GRANTED**. It is **ORDERED** that the plaintiff's claim for relief against this defendant in this civil action is **DISMISSED**.

The court likewise finds this defendant's motion for sanctions under Fed. R. Civ. P. 11 [doc. 22] well taken, and it is **GRANTED**. The court will award sanctions in favor of the defendant Paul T. Coleman against the plaintiff and the plaintiff's counsel, jointly and severally, in the amount of the reasonable attorney's fee and costs, if any, charged for the appearance of counsel for this defendant at the hearing held in this civil action on Friday, May 1, 1992. Counsel for the defendant Mr. Coleman is directed to file, and to serve copies of, a statement of this fee and costs, if any.

ENTER:

/s/ Leon Jordan
Leon Jordan
United States District Judge

# UNITED STATES DISTRICT COURT
# EASTERN DISTRICT OF TENNESSEE
# AT KNOXVILLE

FILED
MAY 5 2:50 PM '92
U.S. DISTRICT COURT
EASTERN DIST. TENN.
BY /s/ C. Sayles, Dep. Clerk

GREGORY C. KRUG, individually and as a partner of Krug Investments; and as a beneficiary of the Eleanor Baron Krug Q-Tip Trust, Krug Family Trust, Carol E. Krug 1988 Trust, and the Carol E. Krug 1974 Trust,

Plaintiff,

v.

AMBROSE, WILSON, GRIMM & DURAND, WILLIAM C. WILSON, PAUL T. COLEMAN, and VALLEY FIDELITY BANK & TRUST COMPANY,

Defendants.

No. CIV 3-91-0350

## MEMORANDUM OPINION

This civil action came on for a hearing on Friday, May 1, 1992 on the defendant Paul T. Coleman's motion to dismiss or, in the alternative, for summary judgment [doc. 23], and his motion for sanctions under Fed. R. Civ. P. 11 [doc. 22]. The court has considered the material filed in support of and in opposition to these motions, and heard the arguments of counsel. The court makes the following findings and conclusions.

The plaintiff filed his initial complaint [doc. 1] on June 10, 1991. Jurisdiction is asserted on the basis of diversity of citizenship. The plaintiff says that he formed the Krug Investments partnership with his father, the late George C. Krug, in 1984; that his father died in July, 1988, which made the plaintiff a successor trustee of the George C. Krug Trust, his mother being the other trustee; and that in 1988, he, individually, as a partner in Krug Investments, and as a trustee of the George C. Krug Trust, retained the defendants Ambrose, Wilson and Mr. Wilson individually as attorneys to render advice concerning certain partnership and trust matters.

The plaintiff alleges that the defendants Ambrose, Wilson and Mr. Wilson individually (Mr. Wilson is a partner in this law firm) committed professional malpractice in several ways. First, he says that they failed to advise him of a requirement that he register, in his capacity as a co-trustee of the George C. Krug Trust, with the Tennessee Secretary of State as a nonresident fiduciary. Second, he says that these defendants were negligent in their advice concerning the George C. Krug Trust agreement, because it turned out that an arbitration clause in the trust agreement was not sufficient to prevent costly litigation seeking the dissolution of the partnership. The plaintiff says that he expressed to these defendants at the outset of the representation his and his late father's desires to avoid this result.

Third, the plaintiff says that Ambrose, Wilson and Mr. Wilson engaged in a conflict of interest by representing Eleanor B. Krug in litigation in the Knox County, Tennessee Chancery Court in which the plaintiff and Krug Investments were named as defendants, and in which the dissolution of this partnership was sought.

In their answer [doc. 9], Ambrose, Wilson and Mr. Wilson say that the plaintiff was a partner in Krug Investments and a remainder beneficiary of the George

C. Krug Trust; that upon the death of George C. Krug, the plaintiff and his mother, Eleanor B. Krug, became co-trustees of this trust, but that the mother had the discretion under the trust instrument to remove the plaintiff as a trustee; that the plaintiff never retained these attorneys as counsel for him individually, and that the plaintiff was never these defendants' client; and that the plaintiff did not seek advice from these defendants concerning his obligations as a nonresident fiduciary. Ambrose, Wilson and Mr. Wilson deny all allegations of professional malpractice made against them. These defendants admit that they were counsel for the plaintiffs in *Eleanor B. Krug, Individually and as Trustee of the Eleanor Barron Krug Revocable Trust and Eleanor B. Krug and Valley Fidelity Bank and Trust Company, Co-Trustees of the George Krug Trust v. Gregory C. Krug, Krug Investments, and Morgan, Keegan & Co., Inc.*, in the Knox County, Tennessee Chancery Court.

On November 15, 1991, with the court's permission, the plaintiff filed his amended complaint, by which he added Paul T. Coleman and Valley Fidelity Bank & Trust Company as defendants in this civil action. In his amended complaint, the plaintiff states a third cause of action, in addition to those for professional malpractice and conflict of interest stated against the two original defendants, against all defendants, including Mr. Coleman as a former partner in Ambrose, Wilson, and Valley Fidelity as receiver of Krug Investments and co-trustee of the various trusts established by George C. Krug. However, the plaintiff seeks only declaratory relief against and discovery from Valley Fidelity, and so has waived for the time being any requirement that Valley Fidelity respond to his complaint.

The plaintiff's third cause of action is for the recovery of all attorney fees paid by the George C. Krug Trust to Ambrose, Wilson, Mr. Wilson, or Mr. Coleman, or to

any firm in which either Mr. Wilson or Mr. Coleman have or had any interest. The plaintiff also seeks to have the trustees of the George C. Krug Trust directed not to pay any more fees to these persons or law firms in privity with them. The plaintiff relies upon an *in terrorem* provision in his late father's will:

> SEVENTH: I hereby revoke any devise, legacy or *benefit* given by this Will or in the Trust referred to in Article THIRD above to each heir of mine or *other persons*, who directly or indirectly either singularly or in conjunction with *any other person or persons* contest or seek to secure the revocation of probate of this Will, or who attacks or seeks to impair or invalidate any of the provisions of this will or such Trust, and as to such devise, legacy and *benefits* so revoked this Will and such Trust shall be executed and carried into effect as if such heir and/or *person* had predeceased me and left no issue of his or her own surviving him or her.

(Emphasis in the quotation in the amended complaint.)

To support this cause of action, the plaintiff alleges in his amended complaint that Eleanor B. Krug wished to finance her purchase of a residence in Knoxville with trust funds; that Mr. Wilson as Ms. Krug's attorney threatened to remove the plaintiff as a co-trustee if he did not agree to this transaction; that the plaintiff then acquiesced, "[s]olely to avoid inter-family (sic) litigation;" that when the plaintiff refused to agree to allow the Eleanor Baron Krug Q-Tip Trust to purchase this residence, Eleanor B. Krug, on Mr. Wilson's advice, withdrew $250,00.00 of Krug Investments' money from an account with Morgan, Keegan & Co.; that after the plaintiff instructed Morgan, Keegan & Co. to seize back these funds, Eleanor B. Krug, on Mr. Wilson's advice,

removed the plaintiff as a co-trustee of the George C. Krug Trust and replaced him with Valley Fidelity; and that the plaintiff and his mother then reached a settlement under which the Knoxville residence would be acquired by the Eleanor B. Krug Revocable Trust, in large part with money borrowed from the Eleanor Baron Krug Q-Tip Trust, the plaintiff would be restored to the status of co-trustee, and the plaintiff would acquire his mother's residence in Louisville at "fair appraisal."

The plaintiff goes on the say that his mother did not enter into this settlement agreement in good faith, but instead planned to remove him again as a co-trustee upon the acquisition of the Knoxville residence; that the parties believed the Louisville residence was worth $465,000.00, but that appraisals showed it to be worth only $275,000.00; that the plaintiff offered to purchase it for the appraised value, and Mr. Wilson counteroffered on behalf of Eleanor B. Krug to sell it for $375,000.00, and suggested that if the plaintiff increased his offer, it might prevent his removal from the position of co-trustee of the George C. Krug Trust; that Eleanor B. Krug did so remove the plaintiff; and that when the plaintiff questioned the validity of this removal, the lawsuit against him filed by Eleanor B. Krug and Valley Fidelity in the Knox County Chancery Court ensued.

The plaintiff says that while this chancery suit was pending, the defendant Mr. Coleman, acting as counsel for the plaintiff Ms. Krug, made a settlement proposal which would have, if accepted, "completely destroyed [the plaintiff's father's] Estate Plan" and "severely impaired" the trusts created by the father. This, the plaintiff says, violated the *in terrorem* testamentary clause quoted above, with the result that the attorneys who were paid fees by the George C. Krug Trust must pay back these "benefits." The plaintiff says also that

the fees charged for the work of Mr. Wilson and Mr. Coleman were unreasonable and excessive.

As for his theory concerning the *in terrorem* clause, the plaintiff says in his amended complaint,

> Plaintiff asserts his position in Count III with a reasonable belief for recovery. Plaintiff admits the theory for recovery is novel and research has provided no guidelines or cases on point. However, Plaintiff believes that the facts and circumstances of this particular case, when taken in the context of the Testator's knowledge, experience and wishes, will demonstrate that Plaintiff's Complaint and demand are well founded and not proffered to harrass (sic), delay or unduly burden any party.

The defendant Mr. Coleman's stated grounds for his motions to dismiss or for summary judgment, and for sanctions, are that the testamentary *in terrorem* clause has nothing to do with the payment of any attorney fees to any firm in which Mr. Coleman has worked as an attorney; that Mr. Coleman has not personally billed any fees to any of these trusts, and has not individually been paid by any of them (which is supported by Mr. Coleman's affidavit [doc. 24]); that because the plaintiff seeks a mandatory injunction preventing the George C. Krug Trust from paying any more attorney fees, his complaint should be dismissed for failure to ask for such an injunction against the co-trustees of this trust, First Tennessee Bank (successor in interest to Valley Fidelity) and Eleanor B. Krug, the second of whom is not even named as a defendant in this civil action; that no cause of action can be based upon the settlement proposal communicated by Mr. Coleman, in light of the inadmissibility of the proposal into evidence; and that the plaintiff's claim for relief against the defendant Mr. Coleman is barred by *res judicata* or collateral

estoppel, because in the chancery suit, a cause of action in the plaintiff's counterclaim that Eleanor B. Krug and Valley Fidelity were not entitled to pay their attorneys' fees from any of the George C. Krug trusts was dismissed with prejudice (which is established by certified copies of papers from the chancery suit, attached to Mr. Coleman's affidavit [doc 24]).

The plaintiff's response [doc. 30A] to this defendant's motions is not supported by any citation to case law, except with respect to the issues of *res judicata* and collateral estoppel. The plaintiff cites no authority to support his argument based upon the *in terrorem* clause; he says that Mr. Coleman benefitted from fees paid to one or both of his law firms, regardless of whether any of these trusts made any direct payment to him; that the indispensable parties argument concerning the failure to sue the co-trustees of the George C. Krug Trust fails because an injunction against First Tennessee Bank would conclude the issue, given that the pertinent trust instrument requires unanimity between the co-trustees; that the inadmissibility of a settlement offer to prove any fact admitted in making the offer does not preclude the existence of a cause of action based upon the offer; and that there is neither identity of issues nor of parties between this litigation and the chancery suit.

One argument made by counsel for the plaintiff at the hearing on these motions must be addressed first. The plaintiff moved to amend his complaint on September 17, 1991 [doc. 10]. The defendants Ambrose, Wilson and Mr. Wilson resisted the amendment [doc. 12], arguing that the addition of defendants sued on a theory other than the malpractice and conflict of interest claims stated against the original defendants would cause unnecessary confusion. These defendants argued also that the issues which the plaintiff was seeking to litigate by his amended complaint had been "raised as somewhat of

a collateral issue" in the chancery suit in the Tennessee court, and that principles of *res judicata* and collateral estoppel should be held to bar the amendment. Ambrose, Wilson and Mr. Wilson also advised the court of some of the other litigation involving the same or related parties which is pending in Tennessee and California courts, and argued that the amendment would compound the harassment effected by this other litigation.

As the transcript of the court's November 14, 1991 hearing on this motion to amend [doc. 20] indicates, the main concern of the original defendants with respect to the amendment was possible confusion of the jury by the different theories of recovery against them and Mr. Coleman, particularly in light of the fact that the theory of recovery against Mr. Coleman involves estate and trust matters not usually submitted to juries. The court was constrained by the law under Fed. R. Civ. P. 15, which requires liberality in allowing such amendments, to allow this one, and noted that a severance of the claims stated in the amendment for separate trial without a jury might turn out to be appropriate.

The transcript also contains the following:

> THE COURT: All right. Now, let's give [the plaintiff] the benefit of the doubt, as I am required to do under the federal rules. What's wrong with letting him file his amended complaint? You are coming up with, from your response, with some defenses already, saying that it's res judicata or collateral estoppel.
>
> MR. DAVES: Right
>
> THE COURT: And if that's the case and the plaintiff is coming in here with his eyes wide open, and he knows what's over in chancery court in Knox County. I do not know. I only

know what you filed here. And having been a chancellor, I know there's a lot more in that file that I haven't seen.

MR. DAVES: It's a lot. It's a lot, right.

THE COURT: Yes. When that's all pressed down, shaken out, if there's nothing there, then, as far as I'm concerned, the plaintiff might be treading on Rule 11 sanctions. You appreciate that, Mr. Lomonaco.

MR. LOMONACO: Your Honor, I appreciate that.

The court cannot, therefore, be argued to be foreclosed from granting either of the motions under consideration merely because it allowed the amendment. The court expressly left open the possibility that the claim against Mr. Coleman stated in the amendment might be held to be meritless, and the possibility that prosecution of the claim might be held to be sanctionable. Furthermore, the unfairness of prohibiting Mr. Coleman from litigating these issues because other defendants raised them before he was in the case is obvious.

Turning to Mr. Coleman's argument that the *in terrorem* clause cannot supply the cause of action advanced by the plaintiff, counsel for the plaintiff admitted both in his amendment to the plaintiff's complaint and at the November 14 hearing that he has been unable to find any authority to support his theory. The court's independent research has also not found any. The court concludes that this testamentary provision does not apply to attorney fees paid by the George C. Krug estate or by any trust established by this deceased settlor.

The leading Tennessee case concerning forfeiture or *in terrorem* clauses like the one in issue is *Tate v. Camp*,

147 Tenn. 137, 245 S.W. 839 (1922). The clause in that case read,

> I have not overlooked any one to whom, under all the circumstances, I think I should have made a bequest, and if any person or persons to whom I have herein made bequests shall enter any contest of this will, upon any ground whatsoever, such person or persons shall forfeit and lose the provision made for them, and what they would have taken shall fall back to my estate and pass under the residuary clause of this will.

The Tennessee Supreme Court refused to enforce the clause against a son who had contested his father's will on the grounds of incompetence and undue influence, where the contest was made in good faith and with probable cause to believe in the existence of a ground or grounds upon which to hold the will invalid.

In some of the authorities quoted with approval by the Tennessee court, the courts noted that strict enforcement of such clauses would empower those guilty of undue influence to silence their adversaries and to prevent courts from discovering the truth. The Tennessee Supreme Court also cited authority for the rule that a proceeding for construction of a will is not a contest for the purpose of such clauses, because one who seeks construction is seeking only to give effect to the testator's true intent. The court quoted with approval from a 1915 treatise on wills by a Mr. Schouler: "All clauses or provisions of this character should at least be construed as strictly as possible, being penal in their operations."

Application of this law to the facts of the case at bar suggests at least two reasons why the plaintiff's theory of recovery against Mr. Coleman is deficient. First, none of the litigation in which Mr. Coleman was

involved as counsel was a contest of the late Mr. Krug's will. There was no contention made by Mr. Coleman's clients in any of the papers which have been shown to this court that this testator's will or any of the trusts which he created was invalid for any reason.

Second, contrary to the plaintiff's creative reading of the clause in issue, it cannot be construed as broad enough to reach fees paid to attorneys or other professional persons. The plaintiff tries to make much of the fact that the forfeiture clause upon which he relies revokes "any devise, legacy or benefit," reading benefit as broadly as possible, but the word in this context is more reasonably construed to refer to any testamentary gift which is not, strictly speaking, a devise (gift of real property) or a legacy (gift of cash), such as a bequest or a gift of a power of appointment.

As for the use of the phrase "each heir of mine or other persons," not every beneficiary of a testamentary gift is necessarily the testator's heirs. Furthermore, the language could have been chosen to account for, for example, an assignee of a legatee's anticipated testamentary gift. It is not necessary to read the late Mr. Krug's will to extend the reach of this *in terrorem* clause to attorneys, and, it being unnecessary, the court will not adopt such a reading in the face of the narrow construction of such clauses mandated by *Tate v. Camp, supra*.

There is, furthermore, a serious reason of public policy why the plaintiff's reading of the clause in issue should not be adopted. A trustee of a trust being entitled to have reasonable attorneys' fees for necessary advice and litigation paid out of the trust estate, *see Vaccaro v. Cicalla*, 89 Tenn. 63, 14 S.W. 43 (1890), it follows that a chancery court is authorized to allow the payment of such fees out of the trust estate. The plaintiff's construction of this forfeiture clause, if adopted, would

enable testators and settlors of trusts to force trustees into a Hobson's choice between entering into litigation, even in good faith and with probable cause to believe it justified, financed out of the trustees' own pockets, and declining litigation in all events. It would also leave trustees' attorneys always unsure whether they might have to refund fees properly earned. The court cannot sanction such a closing of courthouse doors to civil litigants in justified as well as unjustified litigation.

It is plain from what the court has stated here that it is unnecessary to address the other arguments raised in support of and in opposition to the motions under consideration. However, the court must note briefly another reason in support of dismissal of the plaintiff's claim against Mr. Coleman, which is related to this defendant's indispensable parties argument. It is apparent from what has been submitted to the court that the plaintiff is seeking to force Mr. Coleman to reimburse fees paid to Mr. Coleman or to one or both of his law firms by one or more of the George C. Krug trusts. It is equally apparent that any fee which was excessive or otherwise not properly earned should be reimbursed to the trust which paid it, not to the plaintiff, who is merely one of the beneficiaries of these trusts. Therefore, regardless of whether declaratory or injunctive relief against Valley Fidelity (or its successor in interest) might obviate the need to sue the co-trustee of the George C. Krug Trust, Eleanor B. Krug, the plaintiff lacks standing to seek any such relief.

The plaintiff's theory of recovery against the defendant Mr. Coleman in this civil action is not warranted by existing law or by a good faith argument for the extension, modification, or reversal of such law, to use the language of Fed. R. Civ. P. 11. The court reaches this conclusion after consideration of this matter in accordance with the objective standard required by the

rule. In such circumstances, the rule mandates the imposition of some sanction. *See Smith v. Detroit Federation of Teachers, Local 231*, 829 F.2d 1370, 1379-80 (6th Cir. 1987).

The court finds that an appropriate sanction in this case is to require the plaintiff and his attorney, jointly and severally, to pay the reasonable attorney's fee and costs, if any, charged for the appearance of counsel for Mr. Coleman at the hearing held by the court on Mr. Coleman's motions.

For the reasons stated in this memorandum opinion, and in accordance with it, the court will dismiss the plaintiff's claim against Paul T. Coleman in this civil action, and will award sanctions in favor of this defendant against the plaintiff and his attorney.

ENTER:

/s/ Leon Jordan

Leon Jordan
United States District Judge

# APPENDIX C

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF TENNESSEE**
**AT KNOXVILLE**

FILED
JAN 19 10:49 AM '93
U.S. DISTRICT COURT
EASTERN DIST. TENN.
BY /s/ M.Y.A., Dep. Clerk

GREGORY C. KRUG, individually and as a partner in Krug Investments; and as a beneficiary of the Eleanor Baron Krug Q-Tip Trust, Krug Family Trust, Carol E. Krug 1988 Trust, and the Carol E. Krug 1974 Trust,

Plaintiff,

v.

AMBROSE, WILSON, GRIMM & DURAND, et al.,

Defendants.

No. CIV 3-91-0350

**ORDER**

For the reasons stated in the court's memorandum opinion filed simultaneously with this order, the court finds the motion for summary judgment filed by the defendants Ambrose, Wilson, Grimm & Durand and William C. Wilson [doc. 52] well taken, and it is **GRANTED**. It is **ORDERED** that this civil action is **DISMISSED**.

This civil action being dismissed, the court finds these defendants' motion for a protective order with respect to certain discovery depositions [doc. 55] well taken, and it is **GRANTED**. The court also finds the motion for a protective order filed by William H. Inman [doc. 58] well taken, and it is **GRANTED**. It is **ORDERED** that there be no further discovery in this civil action.

The court therefore finds the plaintiff's motion to compel certain discovery [doc. 59] not well taken, and it is **DENIED**.

It is **ORDERED** that the hearing on the plaintiff's motion to compel discovery set on Monday, January 25, 1993 is cancelled.

ENTER:

/s/ Leon Jordan
Leon Jordan
United States District Judge

# UNITED STATES DISTRICT COURT
# EASTERN DISTRICT OF TENNESSEE
# AT KNOXVILLE

FILED
JAN 19 10:49 AM '93
U.S. DISTRICT COURT
EASTERN DIST. TENN.
BY /s/ M.Y.A., Dep. Clerk

GREGORY C. KRUG, individually and as a partner in Krug Investments; and as a beneficiary of the Eleanor Baron Krug Q-Tip Trust, Krug Family Trust, Carol E. Krug 1988 Trust, and the Carol E. Krug 1974 Trust,

Plaintiff,

v.

AMBROSE, WILSON, GRIMM & DURAND, et al.,

Defendants.

No. CIV 3-91-0350

## MEMORANDUM OPINION

This civil action is before the court for consideration of the motion for summary judgment filed by the defendants Ambrose, Wilson, Grimm & Durand and William C. Wilson [doc. 52]. The court has considered this motion, the movants' supporting brief with evidentiary material attached [doc. 53], the plaintiff's response with exhibits [doc 54], the movants' reply [doc. 57]. The motion is ripe for consideration.

In a December 30, 1992 letter to the undersigned's law clerk, the plaintiff, who appears *pro se* in this civil action, and who resides in California, requests that the court rule on this motion without oral argument. The court has determined from its review of the material filed in support of and in opposition to the motion for summary judgment that oral argument would not assist the court in deciding the issues presented. The court will therefore rule on the motion without hearing oral argument.

This is an action for damages for alleged attorney malpractice. This court's jurisdiction is predicated on diversity of citizenship. 28 U.S.C. § 1332. Tennessee law supplies the applicable substantive law. 28 U.S.C. § 1652. The plaintiff's allegations and theories are stated in the court's pretrial order entered July 29, 1992 [doc. 48], amended by order entered August 10, 1992 [doc. 50], allowing the moving defendants' exceptions [doc. 49] to the pretrial order.

The court concludes that consideration of these defendants' motion for summary judgment requires consideration of only one of the issues raised by them. In support of their motion, these defendants have submitted the affidavit of Fredrich H. Thomforde, Jr. [doc. 53, attachment]. Mr. Thomforde is an attorney who practices his profession in Knoxville, the city in which the moving defendants have their offices. For over a decade, he was a member of the faculty of the University of Tennessee College of Law, where he taught on the subjects of legal ethics, corporations, and partnerships, subjects with particular pertinence to this litigation. He has also dealt with these subjects in the private practice of law, and has spoken on legal ethics issues. The court finds Mr. Thomforde qualified as an expert to render the opinion stated in his affidavit. *See* Fed. R. Evid. 702.

In his affidavit, Mr. Thomforde, mindful that adjudication under Fed. R. Civ. P. 56 requires that all reasonable inferences be drawn in favor of the opponent of a motion for summary judgment, and that reasonable doubts be resolved in the opponent's favor, assumes for the purpose of rendering his opinion that an attorney-client relationship existed between the moving defendants and the plaintiff, which is very much a contested issue in this litigation. Mr. Thomforde's opinion is that the advice given by the defendant William C. Wilson, a partner in the defendant partnership, to the plaintiff was "correct and complie[d] with the standard of care exercised by lawyers of ordinary prudence, care, skill and diligence in this community." Because any liability on the part of the defendant partnership is derivative of any liability on the part of the defendant Mr. Wilson, this opinion addresses the plaintiff's claims against both moving defendants.

The plaintiff's response to these defendants' motion for summary judgment consists of a brief containing his recitation of the background of this litigation and other relevant facts, and numerous exhibits which related to the facts recited. In response to the moving defendants' argument based on Mr. Thomforde's affidavit, the plaintiff refers to exhibit 26 to his brief, and states that the ruling of Chancellor William H. Inman in a civil action styled *Eleanor B. Krug, et al. v. Gregory C. Krug, et al.*, No. 105013-2, in the Knox County, Tennessee Chancery Court, establishes that the defendant Mr. Wilson's counselling concerning an arbitration clause in a partnership agreement was negligent. The plaintiff states also his speculation that "[t]he Defendants did not depose [Mr. Thomforde] . . . , because a deposition of [him] would have permitted [the plaintiff] to cross-examine him and the Defendants are terrified as to how he would testify!"

Exhibit 26 to the plaintiff's brief is an excerpt of the transcript of a hearing held in the litigation which was before the Knox County Chancery Court. During this hearing, Chancellor Inman referred to the arbitration clause in issue as "inartfully drawn", as a clause which "must have been drawn by a layman somewhere else", and as "pretty vague". He noted from the bench, reading a reference in the arbitration clause to "the Superior Court of the State of Tennessee", that no court by this name exists in Tennessee's judicial system.

There is nothing in what the chancellor said, however, which addresses what professional duty, if any, the defendant Mr. Wilson and his law firm owed to the plaintiff, the scope of any such duty, and whether the moving defendants breached any such duty. All of the information in this court's file concerning the litigation in the Knox County Chancery Court shows that no such issue of alleged attorney malpractice was before Chancellor Inman. Even accepting as true, for the purpose of ruling on the Rule 56 motion before the court, the plaintiff's view that there was a client-attorney relationship between him and these defendants, and that the defendants' professional obligation extended to counselling concerning the arbitration clause in the proposed Krug Investments partnership agreement, there is nothing here to establish that an issue exists concerning whether the defendants' failure, if any, to predict or to guard against the chancery court's ultimate ruling that a suit to dissolve the partnership was within its jurisdiction, and not subject to arbitration, was a breach of the applicable standard of professional care.

Such a showing is essential to the plaintiff's case here, and must be made with competent expert testimony. *Cleckner v. Dale*, 719 S.W.2d 535, 540 (Tenn. App.), *permission to appeal denied, id.* (Tenn. 1986) (citations omitted) (footnotes omitted). The burden of a

plaintiff who opposes a motion for summary judgment in a case in which expert testimony is essential to come forward with such testimony at the summary adjudication stage of the litigation, or suffer dismissal for his failure to carry this burden, is now well established. *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986). The moving defendants had no duty to depose Mr. Thomforde for the plaintiff's benefit. Fed. R. Civ. P. 26(b)(4)(A) and 56(e). The plaintiff had the duty to come forward with opposing expert testimony, to show the existence of a genuine issue of material fact.

The plaintiff has not carried this burden, after a very full opportunity to do so. The result is that the court must grant the moving defendants' motion for summary judgment. It is unnecessary to address the other issues raised by this motion.

The court has previously dismissed the plaintiff's claim against Paul T. Coleman [doc. 37]. The plaintiff sued the defendant Valley Fidelity Bank & Trust Company, according to the pretrial order, for declaratory relief and discovery purposes only. The court will therefore dismiss this civil action in its entirety.

ENTER:

/s/ Leon Jordan
Leon Jordan
United States District Judge

Supreme Court, U.S.
FILED
APR 28 1994
OFFICE OF THE CLERK

No. 93-1580

In The

# Supreme Court of the United States

October Term, 1993

GREGORY C. KRUG,

*Petitioner,*

vs.

AMBROSE, WILSON, GRIMM & DURAND, and WILLIAM C. WILSON,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

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OR CALL COLLECT (402) 342-2831

## STATEMENT OF ISSUES

A. CLAIMS BASED UPON CONTRAVENTION OF STATE LAW WHICH ARE SUPPORTED BY LONG-ESTABLISHED LEGAL DOCTRINES DO NOT WARRANT REVIEW BY THE SUPREME COURT OF THE UNITED STATES

B. THE SIXTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S GRANTING OF SUMMARY JUDGMENT TO DEFENDANTS WHERE THERE IS NO GENUINE ISSUE OF MATERIAL FACT AS TO NEGLIGENCE ON THE PART OF ANY DEFENDANTS

C. ADDITIONAL FACTORS WHICH WERE PRESENTED TO THE COURTS BELOW SUPPORTING THE GRANTING OF SUMMARY JUDGMENT FOR RESPONDENTS INCLUDE

   I. COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

   II. PETITIONER'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

   III. ABSENCE OF ATTORNEY/CLIENT RELATIONSHIP

   IV. NON-RESIDENT FIDUCIARY

## RULE 29.1 STATEMENT

Ambrose, Wilson, Grimm and Durand is a Tennessee partnership.

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## STATEMENT OF THE CASE

### A. SUMMARY OF PROCEDURAL HISTORY

The plaintiff and petitioner, Gregory C. Krug, filed this action in the United States District Court for the Eastern District of Tennessee on June 10, 1991. In the initial Complaint, Mr. Krug made claims of legal malpractice against Ambrose, Wilson, Grimm & Durand ("Ambrose Wilson") and also against William C. Wilson ("Wilson"), a member-partner of Ambrose Wilson (collectively referred to as respondents). Mr. Krug's Complaint alleged negligent advice in connection with a Partnership Agreement arbitration clause, breach of the Tennessee Code of Professional Responsibility (EC 5-17, DR 5-105) and a conflict of interest in suing Mr. Krug.

Mr. Krug filed an Amended Complaint on September 17, 1991, which added two new defendants: Paul T. Coleman, a former member of Ambrose Wilson, and Valley Fidelity Bank and Trust Company ("Valley Fidelity"). The Amended Complaint alleged that Wilson violated DR 7-102 of the Tennessee Code of Professional Responsibility. It also alleged that the defendants violated an *in terrorem* clause found in the Will of George C. Krug. Mr. Gregory Krug asserted that legal fees paid to the defendants in connection with the underlying Chancery Court lawsuit were "benefits" within the meaning of the *in terrorem* clause and that such fees should be refunded to the George C. Krug Trust due to the alleged breach of the *in terrorem* clause. The Amended Complaint also said that the fees charged by the defendants in connection with the underlying Chancery Court lawsuit were unreasonable and excessive and Mr. Krug sought a refund of these fees.

The respondents filed a Motion for Summary Judgment on the grounds that the Complaint failed to state a claim upon which relief can be granted, that the claim was barred by the applicable Statute of Limitations, that no attorney/client relationship existed between Mr. Krug and these respondents, and that no evidence of negligence existed on the part of these respondents. Filed in support of the Motion for Summary Judgment was the affidavit of an expert witness, Mr. Fred Thomforde, which stated that the defendants had complied with the appropriate standard of care. No counter-affidavit was filed by the plaintiff.

The United States District Court granted respondents' Motion for Summary Judgment. The Honorable Leon Jordan ruled that even after resolving all evidence in the light most favorable to the plaintiff, there is no issue of fact showing that the respondents breached the applicable standard of professional care. Judge Jordan ruled that the plaintiff had been given a "very full opportunity" to carry his burden and present the necessary proof but that he had failed to do so. (Memorandum Opinion and Order (of District Court) filed January 19, 1993, p. 5; Record Document No. 61).

Mr. Krug filed a Notice of Appeal to the Sixth Circuit Court of Appeals on February 5, 1993. The Sixth Circuit affirmed the District Court's decision on January 3, 1994.

## B. STATEMENT OF FACTS

This case arises out of the administration of family Trusts initially established by the plaintiff's father, George C. Krug. Greg Krug was originally a co-trustee of

the family Trusts along with his mother, Eleanor Krug. However, disputes arose between mother and son, and Mrs. Krug exercised her discretionary power under the terms of the Trusts to remove and replace Greg Krug as co-trustee. A Chancery Court lawsuit had to be brought by Mrs. Krug to replace Greg. Mrs. Krug was represented in that action by these respondents. This Chancery Court lawsuit is the basis for this legal malpractice action.

On or about May 4, 1987, George C. Krug, father of Gregory Krug, established the George C. Krug Trust. The Trust Agreement named George C. Krug and his wife, Eleanor Baron Krug, as trustees. The Trust Agreement provided that the George C. Krug Trust was to be divided into three separate Trusts upon the death of George C. Krug, and it provided that the plaintiff would succeed his father as co-trustee of the three resulting Trusts. However, co-trustee Eleanor Krug was granted absolute discretion to remove and replace her son Gregory Krug as co-trustee. In addition, the plaintiff is also a remainder beneficiary of the three resulting Trusts. (Deposition of Gregory C. Krug, pp. 80-83; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53). The Trust Agreement was amended by George C. Krug on July 6, 1987, October 5, 1987, and again on November 5, 1987. (Deposition of Gregory C. Krug, p. 83; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53; Exhibits 5, 6, and 7 to Deposition of Gregory C. Krug).

In addition to the Trusts described above, George C. Krug also established Trusts designated as the "Carol Elaine Krug Trust" (established July 17, 1974) and the

"Eleanor Baron Krug Revocable Trust" (established May 1, 1985).

At some point in or around 1984, Gregory Krug and his father, George C. Krug, allegedly entered into an oral agreement whereby the two agreed to form a general partnership to be known as Krug Investments. In 1985, the plaintiff and his father executed a document memorializing their agreement. (Deposition of Gregory C. Krug, pp. 88-89; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53; Exhibit 8 to Deposition of Gregory C. Krug).

George C. Krug died on July 7, 1988. (Deposition of Gregory C. Krug, p. 99; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53).

After his father's death, Gregory Krug became co-trustee of the Trusts which had been created by his father. Krug decided to "restate and amend" the Krug Investments Partnership Agreement so as to create a partnership among his mother, himself, and the various Trusts that had been created by George C. Krug. Gregory Krug personally prepared an "Amended and Restated" Krug Investments Partnership Agreement, which named Gregory Krug and his mother, in their individual capacities, were named as co-managing partners. (*Id.* at 97). Mr. Krug claimed that the purpose of the new partnership was to create an economy of scale, but it also allowed him to commingle his personal funds with funds from the Trusts. (*Id.*)

Krug drafted the Amended Krug Investments Partnership Agreement by borrowing and modifying specific

provisions of other various Partnership Agreements located in his office. (*Id.* at 102-04).

On July 19, 1988, Krug wrote a letter to Wilson, asking Wilson to review his draft of the Amended Krug Investments Partnership Agreement. In this letter, Krug stated, "I would appreciate your reviewing it, primarily with a view as to whether this arrangement is equitable to Mother, Kaki, and Carol, and secondarily, as to compliance with local law." (*Id.* at 104; Exhibit 10 to Deposition of Gregory C. Krug). (Kaki and Carol are Mr. Krug's sisters). Krug alleged that he had two telephone conversations with Wilson regarding the creation of Krug Investments. (*Id.*) Although he could recall neither the precise dates nor the specific content of these conversations, Krug alleged that during one of these conversations, he discussed his personal desire to avoid protracted litigation. (Deposition of Gregory C. Krug, pp. 104-07, 109; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53). Krug believed that at least one of these telephone calls with Wilson occurred prior to sending the letter of July 19, 1988. (*Id.*)

On July 22, 1988, Wilson responded in writing to Krug's letter of July 19. (*Id.* at 110-11; Exhibit 12 to Deposition of Gregory C. Krug). In his letter, Wilson stated, "We have reviewed the Partnership Agreement and find it to be very complete and in compliance with Tennessee law." (*Id.*) On or about July 22, 1988, Gregory Krug and his mother executed the Amended Krug Investments Partnership Agreement. (Deposition of Gregory C. Krug, pp. 96-97, 101; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record

Document No. 53; Exhibit 9 to Deposition of Gregory C. Krug).

By January of 1990, a dispute had developed between Gregory Krug and his mother, Eleanor Krug. The dispute concerned Eleanor Krug's desire to utilize trust funds to purchase a condominium in West Knoxville. (Deposition of Gregory C. Krug, pp. 118-19; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53). On January 24, 1990, Wilson called Krug and they discussed the dispute between Greg and his mother. (*Id.* at 120).

On February 6, 1990, Gregory Krug sent a letter to Wilson, via facsimile transmission, regarding the dispute between him and his mother. (*Id.* at 119-20; Exhibit 16 to Deposition of Gregory C. Krug). In this letter, Mr. Krug stated, "The purpose of this letter is to respond to the positions you expressed during our telephone conversation of January 24 regarding *your client.*" (*Id.*) (emphasis added). The letter set forth, from Gregory Krug's perspective, the basis for the dispute between Krug and his mother. The letter also described the telephone calls received by Krug on January 24, 1990, from Eleanor Krug and Bill Wilson, and it set forth Krug's interpretation of each of these calls. The letter stated Mr. Krug's displeasure and disagreement with his mother's desire to sell the family home. Krug proposed an offer of compromise, stating, "[i]n lieu of what would be a very ugly lawsuit, let me suggest the following. . . . " Krug concluded his letter of February 6, 1990, by stating:

> If this proposal is not acceptable, *let the litigation begin*. Remember that, even if your client succeeds in causing the Bank to replace me as a co-

> trustee, in my capacity as a beneficiary I will *enjoin* the Bank (as she will surely be fired by the *court*) to prevent it from purchasing a new residence at an excessive price and/or prematurely disposing of the old residence.

(*Id.*) (emphasis added).

On February 13, 1990. Wilson wrote to Gregory Krug on behalf of Eleanor Krug. Wilson provided Gregory Krug with written notice that Eleanor Krug was going to exercise her discretion to remove him as co-trustee of the various Krug Family Trusts. (Deposition of Gregory C. Krug, pp. 125-126; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53; Exhibit 20 to Deposition of Gregory C. Krug). Upon receiving this letter, Gregory Krug began consulting with various attorneys in regard to this dispute. (Deposition of Gregory C. Krug, pp. 126-31; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53).

On February 20, 1990, in response to his receipt of a document entitled "Removal of a Co-Trustee," the plaintiff wrote to Valley Fidelity. Gregory Krug stated his opinion that the removal document was without legal effect, and he issued the following warning:

> By now, you should realize that you are not a co-trustee with respect to these trusts and that, were you to consent to a transaction to which I have objected, you will be liable for damages. Let me suggest that it is in the Bank's best interest to take no action with respect to this matter *until a court of competent jurisdiction has reviewed the facts and rendered a decision* as to the

> identity of the trustee(s) and the appropriateness of the proposed transactions. *As soon as I can retain local counsel, I will initiate this action.*

(*Id.* at 133; Exhibit 25 to Deposition of Gregory C. Krug) (emphasis added).

At this point, local counsel was being sought by Krug with the assistance of Atlanta, Georgia attorney Doug McAlpine. (Deposition of Gregory C. Krug, pp. 133-34; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53).

Sometime prior to March 1, 1990, Gregory Krug retained Knoxville attorney James Kelly Giffin in connection with this dispute. (*Id.* at 135). On March 1, 1990, Giffin wrote Wilson regarding the Krug dispute. In that letter, Giffin accepted an offer of settlement which had been proffered by Wilson by a letter of the same date. (*Id.*; Exhibit 26 to Deposition of Gregory C. Krug).

The settlement agreement referenced in the Giffin letter of March 1, 1990, went sour. At some point prior to May 21, 1990, Krug received a document entitled "Removal of Co-Trustee of the George Charles Krug Trusts." (Deposition of Gregory C. Krug, pp. 139-41; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53; Exhibit 29 and 30 to Deposition of Gregory C. Krug). Mr. Krug contends that he and his mother had entered into a "false truce" since her earlier removal notice. (Deposition of Gregory C. Krug, p. 140; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53). This second removal notice, which had been duly executed by Eleanor Krug on May

18, 1990, stated that Eleanor Krug was removing Gregory Krug as co-trustee of the Family trusts and replacing him with Valley Fidelity Bank & Trust Company, pursuant to her powers as set forth in the Trust Agreement. The receipt of this document prompted Mr. Krug to seek legal advice from the California law firm of Hamilton & Samuels. (*Id.* at 139-41; Exhibits 29 and 30 to Deposition of Gregory C. Krug). On May 21, 1990, Mr. Krug responded to this document by writing to Valley Fidelity of his intention "to contest this matter under theories too numerous to present here." (Deposition of Gregory C. Krug, p. 141; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53; Exhibit 30 to Deposition of Gregory C. Krug). In his letter of May 21, 1990, he warned that, "as soon as I can determine which of my law firms will represent the Trusts and me in a lawsuit against Mrs. Krug, Mr. Wilson, and certain other parties, you will be contacted. I anticipate that this will occur by the end of this week." (*Id.* at 142).

On May 25, 1990, attorney Marc S. Hines of the Hamilton & Samuels law firm wrote the Senior Vice-President of Valley Fidelity, stating that Gregory Krug would be filing a lawsuit against Bill Wilson, Eleanor Krug, Carol Krug, and Catherine Crudup, in the Superior Court for Orange County, California. (Deposition of Gregory C. Krug, p. 144; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53; Exhibit 32 to Deposition of Gregory C. Krug).

On May 31, 1990, Eleanor Krug and Valley Fidelity filed suit in the Chancery Court for Knox County, Tennessee, against Gregory Krug, Krug Investments and Morgan-Keegan & Company, Inc. (Chancery Court for Knox County, Tennessee, Case No. 105013-2) (the "Knox County Litigation").

In the Chancery Court lawsuit, Eleanor Krug and Valley Fidelity sought a declaratory judgment replacing Gregory C. Krug as co-trustee of the Krug Investment Partnership, an Order enjoining the removal of funds from the partnership, an accounting of partnership funds, and a dissolution of the partnership. (Knox County Litigation). After this lawsuit was filed, Mr. Krug raised the issue of the arbitration clause in the Partnership Agreement for the first time. However, it was held by the Chancellor that the arbitration clause did not apply to partnership dissolution. Judgment was entered in favor of Eleanor Krug granting, among other things, injunctive relief against Gregory Krug and dissolution of the partnership. Gregory Krug appealed, but the Tennessee Court of Appeals affirmed. *Krug v. Krug*, 838 S.W.2d 197 (Tenn. Ct. App. 1992) (perm. app. denied by the Tennessee Supreme Court). *See also* Judgment and Memorandum of Chancellor Inman, (Memorandum of Judgment in Knox County Litigation).

In this case, Mr. Krug appealed from the United States District Court's granting of the respondents' Motion for Summary Judgment. After examining Krug's Brief and exhibits and the respondents' argument, which is based on the affidavit of an expert in the field of legal

ethics, partnership and trusts, Judge Jordan granted summary judgment to the respondents, ruling that no genuine issue of material fact exists regarding the alleged negligence and malpractice of the appellees. Furthermore, "the plaintiff had the duty to come forward with opposing expert testimony, to show the existence of a genuine issue of material fact. . . . [but he] has not carried this burden, after a very full opportunity to do so." (Memorandum Opinion and Order, p. 5; Record Document No. 61).

The Sixth Circuit Court of Appeals affirmed.

The respondents submit that the Statement of the Case in Krug's Petition for Writ of Certiorari, primarily at pages 2-4, includes alleged facts which are outside the record. The alleged details of prior family litigation and the various mental impressions and discussions are not matters of proof in this case.

## SUMMARY OF ARGUMENT

The claims raised by Mr. Krug in this action are based upon state law which is supported by long-established legal doctrines. There are no special and important reasons which would warrant review by the Supreme Court.

The Courts below properly granted respondents' Motion for Summary Judgment because no genuine issue of material fact exists as to negligence on the part of any defendant. Additional factors also support the granting of this Motion for Summary Judgment:

1. Both the original and Amended Complaint fails to state a claim upon which relief can be granted;

2. Claims exceed the state statute of limitations found at Tennessee Code Annotated § 28-3-104(a)(2) (1980);

3. There is no attorney-client relationship between Mr. Krug and respondents; and

4. There is no evidence showing that the alleged failure of respondents to notify petitioner about the non-resident fiduciary resident registration requirement constitutes negligence.

Thus, the Sixth Circuit's affirmation of the District Court's granting of the Motion for Summary Judgment should stand. Petition for Writ of Certiorari to the United States Supreme Court should be denied.

## ARGUMENT

### A. CLAIMS BASED UPON CONTRAVENTION OF STATE LAW WHICH ARE SUPPORTED BY LONG-ESTABLISHED LEGAL DOCTRINES DO NOT WARRANT REVIEW BY THE SUPREME COURT OF THE UNITED STATES.

Supreme Court Rule 10 states that "a petition for writ of certiorari will be granted only when there are special and important reasons therefor." The text of the rule sets forth specific reasons that satisfy this standard, which include conflicts between decisions of various circuit courts of appeal or decisions by state or federal courts concerning significant issues of federal law.

This action fails to meet the standard of Rule 10. This action involves an established doctrine for granting a motion for summary judgment and presents no special or important circumstances which would distinguish it from numerous other cases where such a motion is granted. The issues of this case are not of a magnitude sufficient to warrant review by this Court. The appeal to the Sixth Circuit was from the trial court's ruling on a Motion for Summary Judgment in a common law tort action for legal malpractice made in accordance with the usual course of judicial proceedings. The trial court properly evaluated the record which includes an expert opinion, by way of affidavit, on behalf of the respondents. The Court properly noted that the petitioner did not come forward with appropriate rebuttal evidence to create an issue of fact on the threshold issue of legal malpractice and properly dismissed the case. The issues were exclusively those of the application of state common law and federal procedure to the facts of the case. Summary judgment was properly applied in accordance with *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The plaintiff has had a fair and adequate opportunity for consideration of these issues by the Courts below.

This case does not involve a conflict with other courts of appeals or conflicts between state courts regarding a federal question, does not involved a departure from the usual course of judicial proceedings, and does not involve an important question of federal law which should be settled by this Court. The Petition does not raise any of the criteria of Rule 10, and none of those criteria are met by the facts and circumstances of this

case. Accordingly, the respondents respectfully submit that the Petition should be denied.

## B. THE SIXTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S GRANTING OF SUMMARY JUDGMENT TO DEFENDANTS WHERE THERE IS NO GENUINE ISSUE OF MATERIAL FACT AS TO NEGLIGENCE ON THE PART OF ANY DEFENDANTS.

The record in this case clearly shows that Wilson complied with the applicable standard of care for an attorney in the Knoxville, Tennessee community. Mr. Krug failed in his burden to provide any evidence contradicting the testimony contained in the respondents' expert affidavit.

Petitioner Krug claims that Wilson was negligent in rendering advice on the 1988 Partnership Agreement. Wilson maintains that his opinion regarding this agreement was within the appropriate standard of care for attorneys in this community. Wilson supports his Motion on this point with the affidavit of Attorney Fredrich Thomforde. Petitioner Krug failed to respond with a counter-affidavit or with any other material proof as to any negligence on the part of Wilson in this matter.

After a thorough review of the pleadings, depositions, and other relevant materials in this matter, Mr. Thomforde, a noted expert in the areas of legal ethics, partnerships, and trusts, stated that even assuming "that William C. Wilson undertook, in July, 1988, to represent Gregory C. Krug,. . . . [and] that Gregory Krug's July 19, 1988, letter to Wilson . . . includes a request that Wilson

review the arbitration clause,. . . . this advice is correct and complies with the standard of care exercise by lawyers of ordinary prudence, care skill and diligence in this community." (Affidavit of Fredrich H. Thomforde, Jr., pp. 4-5; Exhibit 1 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53).

It is well established that the burden is on "the plaintiff who opposed a motion for summary judgment in a case in which expert testimony is essential to come forward with such testimony at the summary adjudication stage of the litigation, or suffer dismissal for his failure to carry this burden. . . . " Memorandum Opinion, p. 5, *citing Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Petitioner has never made such showing. Even taking all of the material submitted by Krug in his pleadings and briefs as true does not lend any credibility to his contention that the respondents violated a duty owed to him. (Memorandum Opinion and Order, p. 43, Record Document No. 61).

The petitioner's reliance on *Celotex* is misplaced. The respondents submit that the trial court properly relied on *Celotex* in dismissing the case. *Celotex* authorizes and sanctions the use of summary judgment in cases where the nonmoving party fails to properly rebut the evidence presented by the movant so as to create an issue of material fact. The trial court, in accordance with *Celotex*, properly ruled that the respondents' motion shifted the burden to the petitioner to come forward with evidence showing that his claim for legal malpractice had a factual basis. He did not do so. As the plurality in *Celotex* held, summary judgment should be entered against a party

who fails to sufficiently show the existence of an essential element to the party's case on which the party will bear the burden of proof at trial, following Federal Rule of Civil Procedure 56(c). *Celotex* at 323. The plaintiff here failed to present essential expert testimony to support a claim for legal malpractice.

In Tennessee, a lawyer's professional conduct is measured against that degree of care, skill, and diligence which is commonly possessed and exercised by attorneys practicing in the same jurisdiction. *Spalding v. Davis*, 674 S.W.2d 710, 714 (Tenn. 1984); *Cleckner v. Dale*, 719 S.W.2d 535, 540 (Tenn. Ct. App. 1986). Except in the most extreme cases, the standard of care applicable to a lawyer in the given situation should be proven by using expert testimony. *Cleckner*, 719 S.W.2d at 540. Likewise, whether a lawyer's conduct in a given case meets or departs from the applicable standard of care is also an issue which must be proven by expert testimony. *Id.* Respondents presented competent expert testimony of the applicable standard of care and competent expert testimony that the respondent acted in compliance with that standard at all times. (Affidavit of Fredrich H. Thomforde, Jr., pp. 1-5; Exhibit 1 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53).

Petitioner failed to meet his burden of providing expert testimony to show evidence that respondents' negligence exists. Mr. Krug cites *Killingsworth v. Poon*, 307 S.E.2d 123 (Ga. Ct. App. 1983), for the proposition that expert testimony is not required if the negligence is so blatant as to be obvious to a jury composed of laymen. Petitioner's reliance on *Killingsworth* is unwarranted. The alleged negligence involved in this case consists of the

interpretation of a complex Partnership Agreement involving multiple trusts and partners. Even assuming that negligence is present, no jury composed of laymen would ever be able to discern the presence and extent without expert guidance. Moreover, it seems entirely unlikely that an unguided jury could ever find any evidence of negligence in this case for the simple reason that respondents committed no negligent act. The trial court properly decided that expert testimony was required.

Petitioner's reliance on the statements of the chancellor in the previous case as giving credence to his theory of negligence is both misplaced and incorrect. As the District Court noted, reliance on this testimony is misguided because "[t]here is nothing in what the chancellor said, however, which addresses the professional duty, if any, the defendant Mr. Wilson and his law firm owe to the plaintiff, the scope of any such duty, and whether the moving defendants breach any such duty. . . . [N]o such issue of alleged attorney malpractice was before Chancellor Inman." (Memorandum Opinion and Order, p. 4; Record Document No. 61). The record will show that the Chancellor's comments were nothing more than dialogue of a discussion between him and the lawyers regarding general observations of the Chancellor about the Partnership Agreement that Mr. Krug had drafted. The record will further show that in Chancellor Inman's actual Judgment and Memorandum Opinion, none of this dialogue served as a basis for his opinion. (Memorandum Opinion and Order; Record Document No. 61).

Contrary to the petitioner's contention, all doubt as to the existence of any genuine issue of material fact were resolved in favor of the petitioner. The conclusion

reached by Mr. Thomforde (Affidavit of Fredrich H. Thomforde, Jr., pp. 1-5; Exhibit 1 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53), was supported by Judge Jordan's decision.

> Even accepting as true, for the purpose of ruling on the Rule 56 motion before the court, the plaintiff knew that there was a client-attorney relationship between him and these defendants and that the defendants' professional obligation extended to counselling concerning the arbitration clause in the proposed Krug Investments partnership agreement, there is nothing here to establish that an issue exists concerning whether the defendants' failure, if any, to predict or to guard against the chancery court's ultimate ruling that a suit to dissolve the partnership was within its jurisdiction, and not subject to arbitration, was a breach of the applicable standard of professional care.

(Memorandum Opinion and Order, p. 4, Record Document No. 61).

Quite obviously, Krug's objections to the District Court's Judgment must be rejected on every issue. Krug was given the benefit of every possible doubt in the District Court's ruling, yet he failed to meet his burden to show that any issue could ever be resolved in his favor by a rational jury. The court owed no duty to Krug, as a pro se defendant in a civil action, to provide him with any notice whatsoever of his right to file a counter-affidavit. Moreover, even after resolving all possible doubt in Krug's favor, and even assuming that there existed an attorney-client relationship between Krug and Wilson

neither a recognized expert in the field of legal ethics nor the United States District Court could find that there was any genuine issue of material fact supporting the alleged malpractice of the petitioner. The District Court's granting of summary judgment to the appellees should be affirmed.

## C. ADDITIONAL FACTORS WHICH WERE PRESENTED TO THE COURTS BELOW SUPPORTING THE GRANTING OF SUMMARY JUDGMENT FOR RESPONDENTS INCLUDE:

The District Court sustained the Motion for Summary Judgment on the grounds that there was no issue as to breach of the standard of care. Below are discussed additional grounds raised in the respondents' motion that would also support summary judgment if reached by the trial court.

### I. COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

a) Petitioner's allegation that the Partnership Agreement was negligently approved by respondents fails to state a claim upon which relief can be granted. Petitioner alleges that on or about July 19, 1988, he retained the legal services of Wilson and the Ambrose Wilson law firm. Petitioner claims that, while acting within the scope of an attorney/client relationship thus created, Mr. Wilson negligently advised him that the arbitration clause placed into the Amended Krug Investments Partnership Agreement would prevent litigation without exception.

The forgoing allegations, even if true, would not give rise to a legal claim upon which relief can be granted. Furthermore, there is no Tennessee authority stating that the inclusion of an arbitration clause in an amended partnership agreement would prevent litigation seeking judicial dissolution. Under the Uniform Partnership Act found at Tennessee Code Annotated § 61-1-131, courts of competent jurisdiction are empowered to dissolve partnerships on application of a partner. Thus, it does not appear that an arbitration clause contained within a Partnership Agreement, no matter how inflexible, could effectively prevent litigation seeking judicial dissolution in every case.

Petitioner bears the burden of proof on the issue of damages and he cannot establish this essential element. Therefore summary judgment should stand. *Celotex*, 477 U.S. 317; *Goodman v. Phythyon*, 803 S.W.2d 697 (Tenn. Ct. App. 1990).

b) Petitioner's allegation that respondents violated the Code of Professional Responsibility is without merit and fails to state a claim upon which relief may be granted. This issue was recently laid to rest in *Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, 813 S.W.2d 400 (Tenn. 1991). The Supreme Court of Tennessee stated, "conduct that violates the code may not breach a duty to the client and therefore will not constitute actionable malpractice." *Id.* at 404. The court approved cases from numerous jurisdictions which held that state Codes of Professional Responsibility doe not create private causes of action for damages. *Id.* at 404-05.

c) Petitioner's allegation regarding the alleged conflict of interest among respondents also fails to state a claim upon which relief may be granted. In *Stone & Hinds, supra,* the Court stated:

> In cases involving successive representations, a party is required to move that his former lawyer be disqualified as soon as he is aware of the conflict, provided the motion for disqualification or the granting thereof would not place the former client at an unfair disadvantage. *See, Trust Corp. of Montana v. Piper Aircraft Corp.*, 701 F.2d 85 (9th Cir. 1983). The client cannot hold the right in reserve for tactical purposes until it would be most helpful to his position. Failure to move for disqualification at the earliest practical opportunity will constitute a waiver. *See, Central Milk Producers Cooperative v. Sentry Food Stores,* 573 F.2d 988 (8th Cir. 1978).

*Stone & Hinds,* 813 S.W.2d at 410.

At no time during the underlying Chancery Court proceedings did Mr. Krug move to disqualify the Ambrose Wilson firm based upon the firm's alleged previous representation of Krug. (Affidavit of Paul T. Coleman, pp. 1-2; Record Document No. 24). To that extent, it should be noted that in *Stone & Hinds,* the plaintiff did at least raise the conflict of interest issue within the same lawsuit, albeit not until appeal. *Stone & Hinds,* 813 S.W.2d at 410-11. In the chancery litigation which preceded this case, however, petitioner never raised the issue of the alleged conflict, not even on appeal. (Affidavit of Paul T. Coleman, pp. 1-2; Record Document No. 24). *See also Krug v. Krug,* 835 S.W.2d 197 (Tenn. Ct. App. 1992).

Mr. Krug moved to disqualify the Ambrose Wilson firm based upon a different alleged conflict of interest, one which was claimed to exist because of the firm's dual representation of Eleanor Krug and Valley Fidelity. (Deposition of Gregory C. Krug; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53). The motion was subsequently denied. Yet nowhere in this detailed motion did Gregory Krug ever claim that *he* was previously represented by respondents. Moreover, nowhere in this motion did Mr. Krug ever claim conflict of interest because of alleged prior representation of him by Wilson or Ambrose Wilson.

Furthermore, even in Krug's own deposition, Krug never voiced any objection to Wilson's representation of his mother in connection with the dispute regarding the partnership funds. (*Id.* at 141). Quite to the contrary, when questioned about Wilson's representation of Eleanor Krug, the plaintiff stated, "I think I even welcomed it." (*Id.*) Accordingly, Mr. Krug had waived any claim based upon an alleged conflict of interest, and the dismissal of all such claims should be upheld.

d) Lastly, the alleged breach of the *in terrorem* clause and the allegations of unreasonable or excessive legal fees fail to state claims upon which relief may be granted. As to these "novel" claims set forth in the Amended Complaint, respondents respectfully submit that such allegations do not state claims upon which relief can be granted and should be dismissed.

## II. PETITIONER'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

Petitioner's claims are barred by the state statute of limitations found at Tennessee Code Annotated § 28-3-104(a)(2) (1980), which provides that actions against attorneys, whether based on contract or tort, shall be commenced within one year after the cause of action has accrued. Petitioner had notice of the wrongs alleged as early as February 6, 1990, and no later than May 31, 1990, yet this lawsuit was not filed until June 10, 1991, more than one year after his alleged cause of action accrued.

A cause of action for legal malpractice accrues as of the date on which the alleged negligence becomes irremediable. *Americount Club, Inc. v. Hill*, 617 S.W.2d 876, 879 (Tenn. 1981); *Chambers v. Dillow*, 713 S.W.2d 896, 898 (Tenn. 1986); *Batchelor v. Heiskell, Donelson, Bearman, Adams, Williams & Kirsch*, 828 S.W.2d 388, 393 (Tenn. Ct. App. 1991). The legal malpractice cause of action accrues when the plaintiff discovers, or in the exercise of reasonable care and diligence should have discovered, that he has been injured. *Batchelor*, 828 S.W.2d at 893; *Nobes v. Earhart*, 769 S.W.2d 868, 871-72 (Tenn. Ct. App. 1988). The statute of limitations will be tolled only during that period when the claimant had no knowledge that a wrong occurred, and as a reasonable person, was not put on inquiry. *Price v. Becker*, 812 S.W.2d 597, 598 (Tenn. Ct. App. 1991). A plaintiff cannot be permitted to wait until he knows of all the injurious effects as consequences of an actionable wrong before he commenced the lawsuit. *Chambers*, 713 S.W.2d at 898; *Security Bank and Trust Co. v.*

*Fabricating, Inc.*, 673 S.W.2d 860, 864-65 (Tenn. 1983); *Memphis Aero Corp. v. Swain*, 732 S.W.2d 608 (Tenn. Ct. App. 1987).

In this case, Gregory Krug claims that in 1988 he was negligently advised in connection with the arbitration clause contained within the Amended Krug Investments Partnership Agreement. Petitioner also claims a cause of action based on an alleged conflict of interest in the representation by Mr. Wilson of his mother, Eleanor Krug. By February 6, 1990, petitioner knew that the ongoing Partnership dispute between him and his mother could very possibly result in litigation. Furthermore, Mr. Krug was well aware as early as February, 1990, that Wilson was representing Eleanor Krug in the Partnership dispute, and he repeatedly referred to Mrs. Krug as Wilson's "client". (Deposition of Gregory C. Krug, p. 117; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53; Exhibits 16, 24, and 28 to Deposition of Gregory C. Krug). At that time, petitioner made an offer of compromise "[i]n lieu of what would be a very ugly lawsuit." (Deposition of Gregory C. Krug, p. 117; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53; Exhibit 16 to Deposition of Gregory C. Krug). Moreover, he used the possibility of such litigation as a bargaining chip by proclaiming, "If this proposal is not acceptable, let the litigation begin." (Deposition of Gregory C. Krug, p. 117; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53). He again threatened to institute litigation on February 20, 1990, (Deposition of Gregory C. Krug, p. 117; Exhibit 4 to the Memorandum Brief

in Support of Motion for Summary Judgment, Record Document No. 53; Exhibit 25 to Deposition of Gregory C. Krug) and on May 25, 1990 (Deposition of Gregory C. Krug, p. 117; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53; Exhibit 32 to Deposition of Gregory C. Krug). His mother filed the lawsuit on May 31, 1990.

Petitioner and his California law firm, Hamilton & Samuels, threatened to sue Wilson for more than one year prior to the filing of this suit. (Deposition of Gregory C. Krug, p. 117; Exhibit 4 to the Memorandum Brief in Support of Motion for Summary Judgment, Record Document No. 53). On May 25, 1990, Hamilton & Samuels wrote on behalf of Mr. Krug to Mr. Robert Killefer a letter in which the following is contained:

> A lawsuit will be filed on Orange County Superior Court in the State of California *naming William C. Wilson*, Eleanor B. Krug, Carol Krug, and Kathy Crudup, and others, as defendants for causes of action including but not limited to conspiracy to breach the Krug Family Trusts, conspiracy to commit fraud against Gregory C. Krug a beneficiary of the Krug Family Trusts, breach of the Krug Family Trust, wrongful termination of Gregory C. Krug as trustee of the Krug Family Trusts, and for fraud.

(*Id.*) (emphasis added). For whatever reason, Krug contends that beginning January 24, 1990, he experienced emotional distress that was "worse than Vietnam" – far more than one year prior to the filing of this suit.

Petitioner was certainly aware of Wilson's representation of his mother in connection with the Krug family dispute no later than February of 1990. (*Id.* at 86).

## III. ABSENCE OF ATTORNEY/CLIENT RELATIONSHIP.

No attorney/client relationship existed between the petitioner and William C. Wilson or the Ambrose Wilson law firm.

In his Complaint, the plaintiff alleges:

> On or about July 19, 1988, in his capacity as a trustee of the George C. Krug Trust (hereinafter referred to as GCK Trust), and also as a partner in the Partnership and in his individual capacity, Plaintiff retained William C. Wilson (hereinafter referred to as "Wilson") and the law firm of Ambrose, Wilson, Grimm and Durand to provide advice to the Plaintiff, the Partnership and the GCK Trust concerning Plaintiffs duties and responsibilities in serving as a Co-Trustee, and amending and restating the Partnership's agreement prior to transferring the assets of the GCK Trust to the Partnership.

(Complaint, p. 2; Record Document No. 1). Petitioner's assertion is disingenuous and the respondents emphatically deny the truth of this allegation. The record of the conduct, writings, and statements of Mr. Krug provides unequivocal evidence that Wilson was never Mr. Krug's attorney, and that it was not Mr. Krug's intent that he act as such. Because the respondents were not Mr. Krug's attorneys, they owed no duty to him and, accordingly, respondents respectfully request that dismissal of all allegations of legal malpractice be affirmed.

## IV. NON-RESIDENT FIDUCIARY.

There is no evidence of any showing of the alleged failure of defendants to notify plaintiff about the non-resident fiduciary resident registration requirement in any way constituted negligence. Regarding the allegation that the respondents negligently failed to advise petitioner of the non-resident requirement, the respondents submit that there is no evidence whatsoever that they were ever asked to provide legal advice to Mr. Krug regarding his duties as co-trustee of the Krug Family Trusts. Respondents adamantly deny that they were ever asked to provide such advice. Mr. Krug does not allege how this has damaged him. Moreover, this allegation is moot since Chancellor Inman did not rely on this issue in any way in reaching his decision. (Chancery Court for Knox County, Tennessee; Memorandum Opinion April 5, 1991). Mr. Krug alleges that his failure to register as a non-resident fiduciary resulted in the Partnership being placed on receivership. This simply is not a fact and is not supported by Chancellor Inman's Opinion. Accordingly, dismissal of this claim should be upheld.

## CONCLUSION

The respondents respectfully submit that this case presents no issue of law or fact that justifies review by the United States Supreme Court. The petitioner has had this record properly reviewed both at trial court and appellate court levels. The respondents respectfully submit that the

decisions of these courts are proper and that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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